SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

EDWIN K. ATWOOD, ALICE B. ATWOOD, RICHARD W. ATWOOD, N.C.M., by ALICE B. ATWOOD, as His Next Friend and Conservatrix, and ALICE B. ATWOOD, as Conservatrix of the Estate of Richard W. Atwood, N.C.M., THOMAS H. FISHER and RUTH P. FISHER,

Petitioners,

vs.

HUMBLE OIL & REFINING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners Edwin K. Atwood, Richard W. Atwood, N.C.M., by Alice B. Atwood, as his next friend and Conservatrix, Alice B. Atwood, as Conservatrix of the Estate of Richard W. Atwood, N.C.M., Thomas H. Fisher and Ruth P. Fisher, respectfully pray this Court's writ of certiorari to review and reverse or vacate the decision of the United States Court of Appeals for the Fifth Circuit in this case, and to remand the case to the District Court for further proceedings in that court.

CITATIONS TO OPINIONS BELOW.

The District Court of the United States for the Southern District of Texas, Houston Division, did not render any formal opinion in this case. However, since this petition is based in part upon the trial judge's utter abdication of his judicial duty to decide the case himself, and upon the Court of Appeals' affirmance of the trial court's final decree, we append a transcript of the informal remarks or informal opinion of the trial judge as Appendix I hereto.

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is reported in 338 F. 2d 502, and is reprinted in full as Appendix II to this Petition.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The opinion of the Court of Appeals was filed and its judgment was rendered on November 19, 1964. Petitioners' Petitions for Rehearing were denied without a supplemental opinion on January 26, 1965. This petition is filed within 90 days thereafter, in this Court.

This Court's jurisdiction is invoked under Section 1254(1) of the United States Judicial Code (U.S.C.A. Tit. 28, Sec. 1254(1)) which confers upon this Court jurisdiction to review decisions of the United States Court of Appeals.

The United States District Court's jurisdiction was based upon diversity of citizenship, under Section 1332(a)(1) of the United States Judicial Code (U.S.C.A. Tit. 28, Sec. 1332(a)(1)).

THE QUESTIONS PRESENTED FOR REVIEW.

The questions for review are:

1. Were petitioners deprived of their right to due process of law under the Fifth Amendment to the Federal Constitution, because the trial judge wholly failed to perform his judicial duty when, instead of finding the facts specially and stating his conclusions of law thereon separately as required by the mandatory provisions of Federal Rule 52(a), he first directed the trial counsel for defendant (respondent) to "perform the detail work" of drafting *whatever findings of fact and conclusions of law respondent's counsel wished without any guidance from the trial judge himself* (except a passing reference to prior irrelevant litigation, of which there was no evidence in this case, because the trial judge had excluded it), and then, after respondent's counsel had submitted findings and conclusions prepared without any such guidance, the trial judge signed the same mechanically and without any change *as though they had been the result of his own judicial action when, in fact, they were solely the product of respondent's counsel, who was in reality deciding every fact and legal conclusion in this case in his own client's favor?*

2. Were petitioners deprived of their right to due process of law under the Fifth Amendment to the Federal Constitution, because the trial judge made a "blanket" decision of this entire case solely upon the basis of his "feeling" about certain prior litigation between some of the parties *which had nothing whatever to do with any of the issues in this case*, after he had excluded at the trial of this case all evidence (which had been tendered by defendant (respondent)) concerning such irrelevant prior litigation?

3. Were petitioners deprived of their right to due process of law under the Fifth Amendment to the Federal Constitution, because the Court of Appeals affirmed the judgment entered by the trial judge upon the fallacious ground that the petitioners had supposedly failed to "assist the trial judge" by suggesting changes in those findings and conclusions which had been authored solely by Humble's counsel before they were mechanically adopted without change by the trial judge, despite Federal Rule 52(a) and (b) which explicitly provides that no such assistance to the trial judge was required of plaintiffs (petitioners) and despite the plaintiffs' timely motion for new trial and amendment of judgment filed under Federal Rule 59, which pointed out the errors in the findings and conclusions?

4. Did both the trial judge and the Court of Appeals decide important questions of the local law of Texas in a manner directly in conflict with the applicable statutes and decisions of Texas, by holding

(a) That the plain meaning of an unambiguous mineral lease between the parties made in 1933 should be so distorted (in violation of Texas law) as to deprive the mineral lessors (petitioners) of their mineral property rights of a value of many millions of dollars, without granting the mineral lessors (petitioners) any equivalent monetary compensation or any other relief from the mineral lessee (respondent);

(b) That the plain meaning of an unambiguous mineral lease between the parties should be so distorted (in violation of Texas law) as to deprive the mineral lessors (petitioners) of their right to recover monetary damages from the mineral lessee (respondent) which the mineral lessors

(petitioners) suffered from the breach by the mineral lessee (respondent) of its covenant in the mineral lease requiring it to produce a certain minimum quantity of oil and gas from the leased premises, but which minimum quantity it failed to produce, without granting the mineral lessors (petitioners) any equivalent monetary compensation or any other relief from the mineral lessee (respondent);

(c) That the plain meaning of an unambiguous mineral lease between the parties should be so distorted (in violation of Texas law) as to deprive the mineral lessors (petitioners) of their right to demand and receive delivery *in the future* from the mineral lessee (respondent) of the mineral lessors' (petitioners') owned share of physical oil *in kind* to be produced from the leased premises, despite the fact that the entire title to such share of physical oil *in kind* was expressly reserved to the mineral lessors (petitioners) under the explicit terms of the mineral lease;

(d) That the plain meaning of an unambiguous mineral lease between the parties should be so distorted (in violation of Texas law) as to deprive the mineral lessors (petitioners) of their right to reasonable development of their minerals by the mineral lessee (respondent) under the express covenant requiring such mineral development contained in the mineral lease, without granting the mineral lessors (petitioners) any equivalent monetary compensation or any other relief from the mineral lessee (respondent);

(e) That the plain meaning of an unambiguous mineral lease between the parties should be so distorted (in violation of Texas law) as to deprive the mineral lessors (peti-

tioners) of their right to recover monetary damages from the mineral lessee (respondent) suffered by the mineral lessors (petitioners) as a result of the mineral lessee's (respondent's) conversion of the mineral lessors' (petitioners') owned physical oil *in kind* of a value of many thousands of dollars, without granting the mineral lessors (petitioners) any equivalent monetary compensation or any other relief from the mineral lessee (respondent);

(f) That the plain meaning of an unambiguous mineral lease between the parties should be so distorted (in violation of Texas law) as to deprive the mineral lessors (petitioners) of their right to recover monetary damages from the mineral lessee (respondent) which the mineral lessors (petitioners) suffered as a result of the breach by the mineral lessee (respondent) of the express covenant in the mineral lease requiring the mineral lessee (respondent) to advance income tax moneys to the mineral lessors (petitioners), without granting the mineral lessors (petitioners) any equivalent monetary compensation or any other relief from the mineral lessee (respondent);

(g) That the plain meaning of two unambiguous contracts made in 1949 and 1950 providing for the sale by the mineral lessors (petitioners) of all of their physical oil *in kind* which had been produced between specified dates by the mineral lessee (respondent) from the leased premises, and the purchase of such oil by the mineral lessee (respondent), should be so distorted (in violation of Texas law) as to deprive the mineral lessors (petitioners) of their royalty rights under the mineral lease made in 1933, upon the fallacious theory that *payment of the purchase price* of such physical oil *in kind* under these two 1949 and

1950 contracts constituted *payment of royalty* under the 1933 mineral lease, despite the express provisions of the two 1949 and 1950 contracts which precluded any right of the mineral lessee (respondent) to have *the purchase price* of the mineral lessors' (petitioners') oil applied as a credit upon the mineral lessee's (respondent's) obligation to pay *royalty* under the 1933 mineral lease, without granting the mineral lessors (petitioners) any equivalent monetary compensation or any other relief from the mineral lessee (respondent);

(h) That the mineral lessors (petitioners) were not entitled to recover any interest upon the monetary damages to which they were entitled from the mineral lessee (respondent) (in accordance with Texas laws) by reason of the mineral lessee's (respondent's) breaches of the mineral lease and the two written purchase contracts aforesaid?

STATEMENT OF THE CASE.

This case involves a dispute over whether the defendant, Humble Oil & Refinery Company (respondent), as lessee, breached in eight major particulars the provisions of a valid mineral lease made in 1933 of plaintiffs' (petitioners') minerals, which breaches resulted in the plaintiffs' loss of many millions of barrels of oil and cubic feet of gas, and caused damages amounting to several million dollars to the petitioners (R. 805-815).

Prior litigation between certain (but not all) of the plaintiffs (petitioners) and the defendant, Humble, had decreed with finality in 1953 that this mineral lease was valid and binding upon both lessors and lessee (R. 257-9). In other words, at the time when this suit was filed (in 1954), more than a year had elapsed since the prior litigation over the *validity* of the mineral lease had terminated (in 1953). The sole and only ground for the relief sought in this suit was that the mineral lessee (respondent) had breached various separate covenants contained in the *valid* mineral lease, and also two separate contracts for the purchase and sale of certain oil *in kind* produced from the leased premises and owned by plaintiffs (petitioners), over which two separate contracts there had never been *any* prior litigation. No issue as to the *validity* of the mineral lease (the *only* issue actually decided in the prior litigation) was ever raised in this case (R. 805-815).

During the trial of this case in the District Court in Houston, Texas, the trial judge sustained the plaintiffs' objections to all evidence, tendered by the defendant (Humble), relative to certain litigation between certain of the parties to this action, rightly ruling: "We are only

trying *this case* here" (R. 471-2). At the same time, the trial judge also sustained plaintiffs' motion to exclude from the trial record in this case all of the evidence of such prior litigation which was tendered by Humble (DX 21-35; R. 207-9, 611-621). *Thus there was no evidence whatsoever in this case as to what were the issues which were either raised or decided in any prior litigation.*

After the completion of the trial of this case, and after all issues of both fact and law had been voluminously briefed by the counsel for the opposing parties, the trial judge called the parties into his court room to announce his decision in the case (R. 819-822) (See Appendix I hereto). Instead of making his own judicial determination of any of the many and complex issues of fact and of law raised by the litigants as the result of his own independent judicial labors and study, the trial judge merely announced his "blanket" finding of "all issues in favor of the defendant" (R. 820), and then assigned to defense counsel for Humble the job of preparing whatever findings and conclusions to support this "blanket" determination Humble's counsel wished (R. 820-1). Since the trial judge himself gave no specific or other reasons for holding as he did (other than his vague "feelings" about undefined prior litigation, as to which there was no proof in the record), what his assignment to Humble's counsel really amounted to, therefore, was not just asking winning counsel's help in putting his own findings and conclusions on paper, but to decide every fact and legal issue issue under Texas law, and thus to formulate as well the entire rationale of the decision itself, a judicial function pure and simple which should have been performed by the trial judge alone.

In other words, when the trial judge totally ignored the mandatory requirements of Federal Rule 52(a), as well as the many decisions both of this Court and of the Courts of Appeal enforcing these mandatory Federal Rules, and without any other guidance to Humble's counsel than a mere general reference to *the undefined prior irrelevant litigation* by which the trial judge vaguely said he "felt" bound "to some extent," accompanied by the injunction that Humble's counsel be "realistic on the evidence" (whatever that meant) (R. 821), *the trial judge totally abdicated his judicial function to decide the case himself, as a result of his own travail and his own independent judicial labors and study.*

Here is everything upon which the trial judge based his final blanket decision:

> "I *felt* during the trial and *now feel* after reading the briefs and reviewing the evidence that *the defendant* [*Humble*] *should prevail in this litigation. This is just one of the several disputes litigated by these plaintiffs. Plaintiffs have failed in all of them and I feel that I am bound to some extent by the prior adjudications.* (R. 819)
>
> • • •
>
> "Considering the evidence in this case, it is my opinion that the lessee [Humble] had the right under the express provisions of Paragraph 2 of the [mineral] lease to make the designation of the retained minerals that it did make. [This was only one of the eight issues in the case.] I find all [eight] issues in favor of the defendant [Humble] *and I request that defendant's counsel perform the detail work in drafting findings of fact and conclusions of law, consistent with these comments and the evidence. Counsel* [*for respondent, Humble*] *will also draft and submit judgment.* (R. 820)
>
> • • •

> "Of course I want your [Humble's counsel's] findings and conclusions to be *realistic on the evidence* . . ." (R. 821) (Emphasis supplied.)

The final phrase "realistic on the evidence" with reference to both facts and legal conclusions shows that the trial judge was in reality saying: "Please support my blanket conclusion in your client's (Humble's) favor without any help from me."

There were eight important and entirely separate issues of fact and law, involving several million dollars in money as well as the ownership of many millions of barrels of oil and many millions of cubic feet of gas, all of which eight separate issues had been submitted to the trial court as succinctly described in the pretrial order (R. 805-815). Nevertheless the trial judge did not in his oral opinion *find one single fact specially* (even to support his decision of what he called "the principal dispute"), nor did he *state separately one single conclusion of law based on the facts,* to support his decision either of what he called "the principal dispute" or any of the other seven separate important issues between the parties.

What the foregoing conclusively shows is, *first,* that the trial judge did not advance the ends of justice by complying with the mandatory requirements of Federal procedure as laid down in Federal Rule 52(a) by performing his own judicial function and duty to determine all of the special facts and decide all of the separate legal issues based thereon. Instead of being the judicial umpire, he simply walked off the field, telling one team (Humble) that it was to be the victor on whatever grounds it liked.

It shows, *second,* by the trial judge's own oral remarks or opinion, that he was basing his blanket decision in Humble's favor upon the supposed results of certain undefined and unidentified prior litigation, despite the fact

that he had himself deliberately excluded during the trial all evidence tendered thereon by Humble, and also despite the undeniable fact that the prior litigation, which affected only a part of the parties to this action, was *totally irrelevant to any issue in this action,* since it concerned only the *validity* of the mineral lease, whereas this case involved *only* claimed breaches of the mineral lease (as an admittedly valid lease) by the mineral lessee (Humble).

Indeed, the trial judge's own oral remarks or opinion show that he was deciding this case as he did only because he vaguely "felt" himself bound to *some* extent by *some* prior adjudications, *although what prior adjudications he meant and to what extent he "felt" himself bound by them, or why he had this "feeling,"* he utterly failed to explain in his oral opinion. Accordingly, Humble's counsel decided this case in Humble's favor without the slightest basis in any prior litigation, and without the slightest help from the trial judge's opinion, as shown by the Findings of Fact and Conclusions of Law prepared by Humble's counsel (R. 825-834).

In simple words, the trial judge, *instead of acting as the judge in the case and deciding it himself as he should have done,* instructed the defendant's counsel to decide all of the issues in the case in whatever manner appealed to Humble's counsel, so long as the over-all decision was in Humble's favor, thus leaving Humble's counsel completely free to prepare and present to the trial judge whatever factual and legal determinations in favor of his own client (Humble) he saw fit. And when Humble took advantage of this opportunity, it completely ignored the absence of any evidence of the undenied and unproven prior litigation, although that was *the only ground* for the trial judge's blanket decision. A greater travesty on justice can rarely if ever have occurred in a Federal Court.

When these findings and conclusions, which were not in truth authored by the trial judge but were wholly authored by Humble's counsel, were presented to the trial judge on the last day of the year 1963, the trial judge mechanically adopted them by signing them without any change whatsoever; and at the same time he entered the final judgment to the effect "that the plaintiffs take nothing," and "that the action is dismissed on the merits" (R. 825-835) which had been prepared and submitted by Humble's counsel, despite Federal Rule 58 which forbids such submission of a final judgment by counsel except under special circumstances.

The Court of Appeals attempted to justify its opinion and decision affirming the trial judge by obliquely dragging in the prior irrelevant litigation in both the Federal and Texas courts, of which there was no proof whatever in the record, by saying (p. 3):

> "This is the latest, and should be the last, in a long series of protracted litigations concerning the King Ranch and the King Ranch [mineral]."

The two Federal cases, which were referred to in the footnote No. 2 and which had been decided by the same Court of Appeals, the first more than 20 years before, and the second more than 18 years before, were totally irrelevant and totally unproven in the record, and no reference to them appears in the findings and conclusions prepared by Humble's counsel (R. 825-834). The Texas state court cases (only one of which was referred to, quite wrongly, as having "interpreted" the mineral lease (R. 832)) were just as irrelevant and unproven in the record as the Federal cases. As was correctly pointed out in petitioners' motion to amend the Court of Appeals' opinion and petition for rehearing, there was not only no justifi-

cation whatever for attempting to drag this totally irrelevant and unproven prior litigation on other issues into its opinion and decision in this case, but *the Court of Appeals' completely gratuitous admonition against any future litigation between the parties* was an open invitation to Humble to continue to breach the lease in the future, so long as the mineral lease should continue to be operative on the leased premises, exactly as it had breached it in the past.

As an illustration, petitioners carefully pointed out in their motion and petition that Humble had for ten years totally and deliberately breached the reasonable development covenant contained in the mineral lease, by failing to drill even a single one of the wells which the uncontradicted evidence showed a reasonable and prudent operator would and should have drilled on the retained acreage *as the lease expressly required,* and that in fact Humble had also threatened in its reply brief in the trial court to conduct *no future development required of it* under the express reasonable development covenant until it should have what it called an opportunity to re-examine all the geological information applicable to the plaintiffs' properties, which was a mere euphemism for an anticipatory breach of the lease by Humble's refusal in its reply brief to drill any *future* development or discovery wells on the leased premises until it should get good and ready to do so.

The plaintiffs (petitioners), fearing that they might in some way be acknowledging the propriety of the action of Humble's counsel as sole author of the findings and conclusions in the place of the trial judge, and also having in mind the very extensive briefs which they had carefully prepared and filed to aid the trial court in making his decision, but which he had utterly ignored in his oral

opinion, as well as Federal Rule 52(a) and (b) which exculpated them of any duty to do anything more to aid the court, filed no preliminary attack upon these proposed findings and conclusions which had been solely authored by Humble and then presented to the trial judge. However, plaintiffs timely filed under Federal Rule 59 their motion for a new trial, amendment of findings, making of additional findings, and amendment of judgment (R. 836-840), within ten days after the trial judge had adopted Humble's findings and conclusions and had entered his judgment in the form prepared by Humble (R. 836-840), although plaintiffs were under no obligation or duty to do so. The trial judge peremptorily denied this motion on the day after petitioners presented it (R. 843).

The Court of Appeals thus acted contrary to Federal law when it attempted to base its affirmance of the trial judge's decree upon the supposed breach by plaintiffs' counsel of a non-existent duty to assist the trial court in making complete and accurate findings, as codified by the provisions of Federal Rule 52(a) and (b) which explicitly provide that neither requests for, nor objections to, a trial court's findings are a necessary prerequisite to a review of its findings on appeal. *Monaghan* v. *Hill,* 140 F. 2d 31; *Lipman* v. *Arlington Seating Co.,* 192 F. 2d 93.

The Court of Appeals' opinion also erroneously said that plaintiffs' whole argument rested on the "unwarranted assumption" that the district judge failed to perform his duty of making findings and conclusions to support the judgment. There was nothing "unwarranted" about this so-called "assumption." The indubitable fact was that the trial judge did wholly fail in performing his judicial duty in this crucial respect, thereby totally ignoring not only the mandatory provisions of Federal Rule 52(a) but the requirements of ordinary due process of law as well.

On this same subject the Court of Appeals' opinion also said:

> "By *assuming* that the findings do not represent the real determination and conclusions of the trial court, but were merely spoon-fed to the court, the plaintiffs . . . make an *unwarranted assumption* that finds no support in the record." (Emphasis supplied.)

For the reasons already stated, plaintiffs' so-called "assumption" was neither unwarranted nor unfounded, for the fact that the trial judge made no real determination of any facts or any conclusions based thereon is conclusively established by the record (R. 819-822). On the contrary, the findings and conclusions were "spoon fed" to the trial judge, at his own invitation.

In conclusion, the Court of Appeals' opinion, without the slightest justification, charged the plaintiffs with improperly questioning the "integrity" of the trial court. This was a totally unjustified attack upon plaintiffs and their counsel. Not only in the plaintiffs' original briefs but also in their motion to amend the Court of Appeals' opinion and petition for rehearing, the petitioners made it perfectly plain that they were *not* impugning or questioning the "integrity" of the trial judge. Petitioners said in their original brief:

> "We regret that duty to our clients requires us to question in this appeal, as one of our principal grounds for reversal, the manner in which the trial court finally disposed of the issues in this action. While we have the highest regard for the trial judge, both professionally and otherwise, we believe that in this case he abandoned his judicial office to the prevailing counsel, without realizing the effect of his actions."

Also in their same brief petitioners also said:

> "The totally unsupported judgment of 'all issues' in favor of one litigant, in this case Humble, is in itself evidence of prejudgment or 'legal' prejudice within the purview of the decisions on the subject, no matter that the trial court was obviously unconscious of it himself, and this was enough to deprive plaintiffs of due process of law under the Fifth Amendment. *N. L. R. B.* v. *Phelps,* 136 F. 2d 562, decided by this Court in 1943; *N. L. R. B.* v. *Ford Motor Co.,* 114 F. 2d 905 (6 Cir. 1940), cert. den. 312 U.S. 689; *Lee* v. *Fleming,* 158 F. 2d 984 (U.S. Emergency Ct. of App. 1946), cert. den. 331 U.S. 805; *Pittsburgh S.S. Co.* v. *N. L. R. B.,* 167 F. 2d 126 (6th Cir. 1948). We say this respectfully and not maliciously, because one of the distinguishing qualities that this trial judge has consistently displayed on the bench is fairmindedness; and there can be no doubt that he intended and believed himself to be completely fairminded in this case."

In sum, what the foregoing shows is, *first,* that plaintiffs were deprived of due process of law by the trial judge's complete abdication of his judicial duty to decide this case himself; and *second,* that the trial judge deliberately breached his mandatory duty to make special findings of fact and separate conclusions of law as required by Federal Rule 52(a).

Thus the decisions of the District Court and the Court of Appeals in this case are directly and squarely in conflict with the decisions of this Court and the same and other Courts of Appeal. *Mayo* v. *Lakeland Highlands Can Co.,* 309 U.S. 311; *Kelly* v. *Everglades Drainage District,* 319 U.S. 415; *Dalehite* v. *U. S.,* 346 U.S. 15; *Tax Commissioners* v. *Jackson,* 283 U.S. 527; *Public Service Com.* v. *Wisconsin Tel. Co.,* 289 U.S. 67; *Railroad Com. of Wis.* v. *Maxcy,* 281 U.S. 82; *U. S.* v. *Forness,* 125 F. 2d 928, cert.

den. 316 U.S. 694, decided in 2 C.C.A., and cited with approval in *U. S.* v. *Crescent Amusement Co.*, 323 U.S. 173, at p. 185, and by the 5 C.C.A. in *Edward Valves, Inc.* v. *Cameron Iron Works, Inc.*, 289 F. 2d 355, at p. 356; *Winter Park Telephone Co.* v. *Southern Bell Tel. & Tel. Co.*, 181 F. 2d 341 (5 C.C.A.); *In re Woodmar Realty Co.*, 307 F. 2d 591. In *Matton Oil Transfer Corp.* v. *The Dynamic*, 123 F. 2d 999, the 2 C.C.A. condemned findings "prepared by winning counsel after the event," citing the *Mayo, Interstate* and other cases. And in the *Edward Valves* case, the 2 C.C.A. condemned the "mechanical adoption" of an attorney's suggested findings by the trial judge. In *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.*, 259 F. 2d 398, cert. den. 361 U.S. 903, 368 U.S. 90, the 5 C.C.A. insisted that the trial judge's findings and conclusions should "represent the independent judicial labors and study of the district judge," which requirement the same 5 C.C.A. repeated in *Louis Dreyfus & Cie* v. *Panama Canal Co.*, 298 F. 2d 733.

The 5 C.C.A. cited in the *Dreyfus* case the case of *The Severance*, 152 F. 2d 916, cert. den. 328 U.S. 853, in which the 4 C.C.A. said of findings and conclusions prepared by winning counsel: "This practice is not to be commended," because such findings and conclusions are not "entitled to the same weight and dignity" as those representing "the unfettered and independent judgment of the trial judge." And in *Tanker Hygrade No. 24* v. *The Dynamic*, 213 F. 2d 453, the 2 C.C.A. held that the findings and conclusions of the trial judge should "give unmistakable evidence that he has prepared them as a result of his own independent study and research." In *Myles* v. *Quinn Menhaden Fisheries, Inc.*, 302 F. 2d 146, the 5 C.C.A. said, citing the *Dreyfus* case, that the trial judge should speak "from his own travail," thereby avoiding "the process of adopting verbatim those [findings and conclusions] proposed by counsel."

In *Chicopee Mfg. Corp.* v. *Kendall Co.*, 288 F. 2d 719, cert. den. 368 U.S. 825, the 4 C.C.A. said that "there is no authority in the federal courts that countenances the preparation of the opinion by the attorney for either side," and: "That practice involves the failure of the trial judge to perform his judicial function and when it occurs without notice to the opposing side, as in this case, it amounts to a denial of due process."

We are not saying that a trial judge may not obtain the aid of winning counsel in preparing his findings and conclusions, for there are many cases holding he may do so, *provided, however,* that the findings so made "shall be those of the trial judge *himself.*" *Schilling* v. *Schwitzer-Cummins Co.*, 142 F. 2d 82, at p. 84. The findings of the trial judge in the case at bar were Humble's findings and *not* "those of the trial judge himself."

As recently as July 1, 1963, Federal Rule 58 was amended to provide:

> "Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course."

Such amendment obviously intended that the trial judge himself, and *not* the attorneys, should be the sole author of the final judgment in the case, except in some unusual circumstance, absent in the case at bar. When the trial judge, without finding any special circumstances, directed Humble's counsel to prepare the final decree in this case (R. 820), he plainly violated the Amended Rule 58.

For further cases holding that when, as in this case, the trial judge has said that he "felt" during the trial that one party (Humble) should prevail upon "all issues," thereby prejudging it (R. 819), the other party has thereby been deprived of due process of law under the Fifth

Amendment, see *Rosenberg* v. *Baum,* 153 F. 2d 10 (10 C.C.A.); *N. L. R. B.* v. *Phelps,* 136 F. 2d 562 (5 C.C.A.); *N. L. R. B.* v. *Ford Motor Co.,* 114 F.2d 905 (6 C.C.A.), cert. den. 312 U.S. 689; *Lee* v. *Fleming,* 158 F. 2d 984 (U.S. Ct. App.), cert. den. 331 U.S. 805; *Pittsburgh S.S. Co.* v. *N. L. R. B.,* 167 F. 2d 126 (6 C.C.A.).

This Court has often held that plaintiffs who have properly invoked the diversity jurisdiction of the District Court have a constitutional right to have their claims properly adjudicated there (*Smithers* v. *Smith,* 204 U.S. 632; *Meredith* v. *Winterhaven,* 320 U.S. 228; etc.), and to a "day in court" (*Railroad Com. of Cal.* v. *Pacific Gas & Elec. Co.,* 302 U.S. 388; *Morgan* v. *U. S.,* 304 U.S. 1; *Anderson National Bank* v. *Luckett,* 321 U.S. 233; etc.).

The attempt in the Court of Appeals' opinion to cover up the grave dereliction of the district judge, by maintaining (a) that the prior irrelevant and unproven litigation "should be the last," (b) that the plaintiffs had breached a supposed but non-existent duty to assist the trial judge by objecting to the findings and conclusions authored solely by winning counsel, (c) that plaintiffs had made what was only an "unwarranted assumption" that the trial judge had failed in properly performing his judicial duty, and (d) that plaintiffs had thereby improperly questioned the "integrity" of the trial judge, cannot defeat the conclusion that the trial judge's dereliction of judicial duty, as sanctioned and approved by the Court of Appeals, constituted a plain violation of the most basic principles of Federal law.

The Federal and Constitutional Issues Were Raised By Petitioners at Their First Opportunity.

Their contention that the foregoing acts by the trial court and the Court of Appeals constituted a violation of Federal law and deprived petitioners of their right to due

process of law under the Fifth Amendment to the Federal Constitution was timely raised by petitioners at their first opportunity in the Court of Appeals. *Saunders* v. *Shaw,* 244 U.S. 317; *Missouri* v. *Gehner,* 281 U.S. 313; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673; etc.

THE IMPORTANT QUESTIONS OF THE LOCAL LAW OF TEXAS DECIDED BY BOTH THE TRIAL JUDGE AND THE COURT OF APPEALS IN A MANNER DIRECTLY IN CONFLICT WITH THE STATUTES AND DECISIONS OF TEXAS.

The record in this case shows that both the trial judge and the Court of Appeals decided important questions of local law of Texas in a manner directly in conflict with the Texas statutes and decisions, in the following respects:

1. The plain and unambiguous meaning of the mineral lease between the parties was so distorted as to deprive the mineral lessors (petitioners) of their mineral property rights worth many millions of dollars, without granting petitioners any equivalent monetary compensation or other relief.

2. The plain and unambiguous meaning of the mineral lease was so distorted as to deprive the mineral lessors (petitioners) of their right to recover monetary damages suffered by them as a result of the plain breach by Humble of its covenant in the mineral lease requiring it to produce a certain minimum quantity of oil and gas from the leased premises, without granting any equivalent monetary compensation or other relief to the petitioners.

3. The plain and unambiguous meaning of the mineral lease was so distorted as to deprive petitioners of their right to demand and receive delivery *in future* of their owned share of the physical oil *in kind* recovered by Humble from the leased premises.

4. The plain and unambiguous meaning of the mineral lease was so distorted as to exculpate Humble from its obligation under the express reasonable development covenant of the lease, without granting petitioners any equivalent monetary compensation or other relief.

5. The plain and unambiguous meaning of the mineral lease was so distorted as to deprive petitioners of their right to recover monetary damages resulting from Humble's conversion of the physical oil *in kind* owned by petitioners, without granting petitioners any equivalent monetary compensation or other relief.

6. The plain and unambiguous meaning of the mineral lease was so distorted as to deprive petitioners of their right to recover monetary damages resulting from Humble's plain breach of its covenant to advance income tax moneys to petitioners, without petitioners' receiving any equivalent monetary compensation or other relief.

7. The plain and unambiguous meaning of the entirely separate contracts, entered into between the parties to the lease 16 and 17 years after the lease was made, providing for the purchase by Humble and the sale by petitioners of certain physical oil *in kind* owned by petitioners which had been extracted from the leased premises was so distorted as to deprive petitioners of their royalty rights under the lease, upon the fallacious theory that the payment of the purchase price for petitioners' physical oil *in kind* constituted payment by lessee of royalty under the mineral lease, without petitioners receiving any equivalent monetary compensation or other relief.

8. Petitioners were deprived of their right to recover interest upon the money damages to which they were entitled by reason of Humble's plain breaches of the mineral lease and the two separate written contracts above mentioned.

Insofar as the decisions of both the trial court and the Court of Appeals determined each of the foregoing issues, such decisions constituted an adjudication of important questions of local Texas law in a manner in conflict with the Texas statutes and the Texas applicable decisions. This is a grave violation of Federal law. *Erie R. Co.* v. *Tompkins,* 304 U.S. 64; *Klaxon Co.* v. *Stentor Mfg. Co.,* 313 U.S. 487; *Griffin* v. *McCoach,* 313 U.S. 498; *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 425.

REASONS RELIED UPON FOR THE GRANTING OF THE WRIT.

The plain fact is that in this case the trial judge not only totally ignored his judicial duty under Federal Rule 52(a), which in mandatory language required him to find the facts specially and to state his conclusions of law separately thereon (a failure which has been repeatedly held by many decisions of this Court and of the Court of Appeals to require a reversal and remand with directions that such findings and conclusions be made by the trial judge), but instead the trial judge deliberately turned over the entire decision of this case and the determination of the grounds therefor to counsel for the respondent, Humble Oil & Refining Company, without giving any guide to Humble's counsel as to how to do what the trial court described as this "detailed work," other than the injunction that Humble's counsel "be realistic on the evidence," which was no real guide at all.

Moreover, the Court of Appeals, instead of dealing with this subject on its merits, improperly attempted to justify the trial judge's action upon the ground that there had been prior litigation between some of the litigants, though without pointing out that there was no evidence of any

prior adjudications in this case, and that every one of the issues in these prior Federal and Texas cases was totally irrelevant to the issues in this case.

Also the Court of Appeals unjustly accused the petitioners of failing to give any assistance to the trial court in making complete and accurate findings, despite the extensive briefs previously filed by the plaintiffs with the trial judge, and also despite plaintiffs' timely motion for a new trial, amendment of findings, making of additional findings, and amendment of judgment. In so doing, the Court of Appeals ignored the fact that under Federal Rule 52(a) and (b) the petitioners were under no obligation whatever to make any requests for new or different findings or to object to those authored by Humble's counsel, as the prerequisite to a challenge of the latter on this appeal.

This whole question of whether the trial judge must decide the case and state the grounds of his decision as a result of his own judicial action, or whether he can simply make an off-hand reference to other irrelevant and unproven prior litigation, and then leave the entire decision of the case and the determination of the grounds therefor to winning counsel, goes to the very heart of the judicial process in the Federal Courts and squarely raises the question whether the losing litigants have been deprived of their constitutional right to due process of law.

Thus the Court of Appeals has erroneously decided an important question of substance under Federal law which ought to be decided by this Court.

Both the trial court and the Court of Appeals distorted the plain provisions of the unambiguous mineral lease between the parties, as well as the two separate unambiguous contracts for the purchase and sale of oil owned by

plaintiffs, and misapplied the law of Texas thereto in such a manner as to deprive plaintiffs not only of their mineral rights worth many millions of dollars, but also of their rights to compensatory damages and other relief because of Humble's plain breaches of both the mineral lease and the two contracts.

This petition for certiorari is not the place for us to elaborate upon these important questions of the local law of Texas which are outlined above and which were erroneously decided, in violation of Federal law, by both the District Court and the Court of Appeals in a manner directly in conflict with the applicable Texas statutes and decisions. The proper forum for that determination obviously is the District Court, to which this cause should therefore be returned for that purpose. *Commissioner* v. *Duberstein*, 363 U.S. 278, at 292-3.

The trial judge having abdicated his judicial function in violation of Federal law, thereby depriving plaintiffs of due process of law, and the trial judge's decision having contravened the applicable Texas statutes and decisions, also in violation of Federal law, the judgment based upon conclusions of fact and law authored only by winning counsel should be reversed and the cause remanded to the District Court. Obviously that is the only court which can and should determine the facts and then decide the important questions of local Texas law outlined above. In other words, due process of law requires not only a trial but also a judicial decision of both facts and law *in the trial court*, and unless and until this is done no action by the Court of Appeals can supply this omission. *Commissioner* v. *Duberstein, supra.*

CONCLUSION.

Petitioners recognize that the granting of this Petition for Certiorari is discretionary with the Court, and that such writ will not ordinarily be granted merely because of error by the District Court or the Court of Appeals, unless such error controverts fundamental Federal law.

In the case at bar, however, the trial judge has entered a judgment which is not based upon his own judicial decision, and which contravenes the local Texas statutes and decisions, in both of which respects the judgment is a violation of fundamental Federal law.

The Court of Appeals, in affirming the District Court's judgment upon the fallacious grounds set forth in its opinion, has decided important questions of Federal law in a way in conflict with applicable decisions of this Court.

The violation of Federal law is therefore so plain and undeniable in this case that petitioners submit that this case calls for an exercise of this Court's power of supervision, and that the Court should grant the prayer of the present petition accordingly.

PRAYER FOR PETITION FOR WRIT OF CERTIORARI.

Wherefore, Petitioners pray for the issuance of this Court's writ of certiorari to review and reverse or vacate the judgment of the Court of Appeals for the Fifth Circuit in the case of *Edwin K. Atwood, et al.* v. *Humble Oil & Refining Company*, 338 F. 2d 502, and to remand the case to the District Court for further proceedings in that court, to the end that petitioners' federal and constitutional rights herein claimed may be effectuated.

Respectfully submitted,

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APPENDIX I

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. .....

EDWIN K. ATWOOD, ALICE B. ATWOOD RICHARD W. ATWOOD, N.C.M., by Alice B. Atwood as His Next Friend and Conservatrix, ALICE B. ATWOOD, as Conservatrix of the Estate of Richard W. Atwood, N.C.M., THOMAS H. FISHER and RUTH P. FISHER,

Appellants,

versus

HUMBLE OIL & REFINING COMPANY,
a Texas Corporation,

Appellee.

Appeal from the United States District Court,
for the Southern District of Texas

[2012] PROCEEDINGS

December 13, 1963

The Court: I have asked counsel in the case of Civil Action No. 8630 to be present. I am ready to announce The Court's disposition in this case. It should not take long.

This case was tried in March of this year. It was taken under advisement. Briefs were filed on May 13th and reply briefs were filed on June 17th. Since then The Court has

been busy with court assignments, but I have now taken some time out to study the briefs and review the testimony and exhibits.

I felt during the trial and now feel after reading the briefs and reviewing the evidence that the defendants should prevail in this litigation. This is just one of the several disputes litigated by these plaintiffs. Plaintiffs have failed in all of them, and I feel that I am bound to some extent by the prior adjudications. The principal dispute in this case is the interpretations of Paragraph 2 of the oil and gas lease of 1933. It is not usual or classical form. It is not, for instance, such a form as found in Waggoner versus Sigler or in the many eighty-eight forms. It is a form which the contracting parties had [2013] a right to and did agree upon. Both the lessor and lessee had competent counsel. It states the contract the parties are bound by in this case. It gives the lessee the right of designation at the expiration of the primary term. It gives the lessee the right to retain under the terms of the lease and I am now reading from Paragraph 2 of the lease, "The area or areas included within the geologic structures or formations proven to be productive at the end of said twenty year period."

Then reading further from Paragraph 2, "And in de- or areas are proven to be productive, only the area or areas shall be designated from which there are being produced oil and gas and/or other minerals at the end of the twenty year period."

Then reading further from Paragraph 2, "And in determining the extent of such productive area or areas, considerations shall be given to geologic information obtained from oil wells, including dry holes if any, in the

vicinity and from the surface geology and from investigation with geological instruments or methods and/or from other methods which then may be in use in the industry."

Then reading further, "Continuing to the end of Paragraph 2, and as to said area or areas, the [2014] lessee shall continue."

Considering the evidence in the case, it is my opinion that the lessee had the right under the express provisions of Paragraph 2 of the lease to make the designation that it did make. I find all issues in favor of the defendant and I request that defendant's counsel perform the detail work in drafting the findings of fact and conclusions of law, consistent with these comments and the evidence. Counsel will also draft and submit judgment.

You may have anticipated this Mr. Morgan? Have you drafted findings and conclusions?

Mr. Morgan: I have them in some very rough draft ideas, Judge.

The Court: How long do you think it will take to draft them and submit them to The Court?

Mr. Morgan: I believe I could do so within the coming week, Your Honor.

The Court: Then could we close this case before the end of the month?

Mr Morgan: I think so, Judge.

The Court: I think you should submit them to Mr. Farr. I will want him to examine them before they are entered. Submit to him your draft of findings and conclusions, and also your draft of judgment.

[2015] We don't have to conclude it before the end of the year, but I would like to if we can. It is an old case.

Mr. Morgan: Yes.

The Court: Of course, I want your findings and conclusions to be realistic on the evidence. There is a lot of evidence in the case. I suppose there will be an appeal, Mr. Farr?

Mr. Farr: Yes, sir. I anticipate so.

The Court: Very well. Is there anything further that either of you have to say at this time?

Mr. Farr: No, Your Honor.

Mr. Morgan: No.

The Court: The transcript has already been drafted. You should be able to perfect your appeal within the forty day period.

Mr Farr: If that is already in order, I suppose there won't be any occasion for delay, yes, sir

The Court: All you have to do is make your designation.

Mr. Farr: Yes, sir.

The Court: Very well. If there is nothing further, court will stand adjourned.

(Adjournment)

APPENDIX II

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21606

EDWIN K. ATWOOD, ALICE B. ATWOOD, RICHARD W. ATWOOD, N.C.M., by ALICE B. ATWOOD as his next friend and conservatrix, and ALICE B. ATWOOD, as conservatrix of the Estate of Richard W. Atwood, N.C.M., THOMAS H. FISHER and RUTH P. FISHER,

Appellants,

versus

HUMBLE OIL & REFINING COMPANY,

Appellee,

Appeal from the United States District Court for the Southern District of Texas

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(November 19, 1964.)

Before HUTCHESON, RIVES and BROWN, Circuit Judges.

HUTCHESON, Circuit Judge: This case arose out of a dispute concerning the proper construction of a mineral lease and contemporaneous contracts executed on September 26, 1933, by the independent executors and trustees under the will of Mrs. Henrietta M. King, wife of the

founder of the King Ranch, and Humble Oil & Refining Company. Mrs. King died in 1925, leaving the ranch in trust for a term of ten years to named trustees, three of whom were also named independent executors of her estate, whose duties included partitioning the estate among the persons designated in Mrs. King's will. The lease involved here was executed to Humble, Defendant-Appellee,[1] prior to the partition of Mrs. King's estate and is known as the King Ranch lease. Contemporaneously the trustees borrowed $3,500,000 from Humble, executing a contract which recited the details of the loan agreement. The parties also entered a "nonexploration agreement", some provisions of which we will mention below.

Subject to the lease, the trustees on March 30, 1935, partitioned to the Atwood branch of the King family 10,809.9 acres in Jim Hogg County and certain acreage in Willacy and Kenedy Counties known as the Sauz Ranch. These tracts, together with two small tracts in Willacy County called the Bell and Bell B tracts are collectively known as the Atwood properties and all lie within the bounds of the Humble lease. In the partition deed the trustees also apportioned a part of the debts owed Humble to the lands partitioned to the Atwoods. The Atwood plaintiffs sue as successors to the original lessor's interest in that portion of the King Ranch partitioned to them. It was stipulated for purposes of this suit that plaintiffs Thomas H Fisher and his wife, Ruth P. Fisher, have acquired 45 percent of the Atwood title.

The lease had a primary term of twenty years, ending on September 26, 1953. It provided that promptly after the end of the primary term Humble should designate

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[1] The parties will hereafter be designated as they appeared in the district court, Humble as defendant and the Atwoods and Fishers as plaintiffs.

"the area or areas on which oil, gas and/or other minerals are then being produced . . ." and that the lease would continue in effect for the designated areas, but terminate as to all others. When the primary term ended there was production on the Atwood properties from the Willamar oil pools and the Tenerias gas pool on the Sauz Ranch and the Colorado oil pool in Jim Hogg County. Therefore Humble executed two instruments designating for retention those portions of the Atwood properties which it deemed to be "producing areas" as of the end of the primary term. This included 50,476.6 acres on the Sauz Ranch, 480 acres of the Atwood acreage in Jim Hogg County, and the Bell and Bell B tracts in Willacy County.

In 1954 plaintiffs filed this suit to construe the lease and contemporaneous contracts, to recover damages for alleged breaches of the lease minimum production formula and reasonable development covenant, to secure their royalty interest in kind rather than money, to recover Humble's profits from refining oil alleged to belong to plaintiffs, to declare two large payments made to plaintiffs by Humble to have been for sale of specific oil rather than payment of royalty under the lease, to recover interest on money allegedly owed by Humble, and to secure certain production and reserve data from Humble concerning the entire King Ranch.

This is the latest, and should be the last, in a long series of protracted litigations concerning the King Ranch and the King Ranch lease.[2] The district court held for the

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[2] For the disposition of the earlier litigation see the following cases: Atwood v. Kleberg, et al., 133 F(2) 69 (5th Cir. 1943), rehearing denied 135 F(2) 453, cert. denied 320 U.S. 744; Atwood v. King et al., 163 F(2) 104 (5th Cir. 1947); Atwood v. Humble Oil & Refining Co., et al., 244 SW(2) 637 (Tex. Sup. Ct. 1951); Humble Oil & Refining Co. v. Fisher, 253 SW(2) 656 (Tex. Sup. Ct. 1952), cert. denied 345 U.S. 970.

defendant on all issues presented and entered judgment that plaintiffs take nothing. The record fully supports the findings, conclusions and judgment of the district court, and we could, without more, order the judgment affirmed. However, by way of explanation, we shall deal with each of the plaintiffs' contentions in turn, designating them by letter as they were presented to this court.

In their Contention A, plaintiffs argue that the area Humble designated as that portion upon which the lease should remain in force after the primary term of twenty years should be reduced so as to include only the pools of hydrocarbons actually in production at the end of the primary term. This portion of the case turns upon construction of the following lease provision:

> "at the expiration of said twenty years if oil, gas or other mineral is then being produced from said land, the lessee shall promptly designate and define in writing the area or areas on which oil, gas and/or other minerals are then being produced, it being contemplated that lessee shall have the right to retain under the terms of this lease the area or areas included within the geologic structures or formations proven to be productive at the end of said twenty year period; and in determining what area or areas are proven to be productive only the area or areas shall be designated from which there are being produced oil, gas and/or other minerals at the end of such twenty year period, and in determining the extent of such productive area or areas consideration shall be given to geologic information obtained from all wells, including dry holes, if any, in the vicinity and from the surface geology and from investigation with geophysical instruments or methods and/or from other methods which then may be in use in the industry; and

> as to said area or areas the lease shall continue as long thereafter as oil, gas, or other mineral is produced therefrom."

Plaintiffs do not attack Humble's designation of the Colorado Field in Jim Hogg County, but they contend that the designation on the Sauz Ranch property, including the Willamar oil pools and the Tenerias gas pool, was not properly made. Humble designated the area to be retained by a metes and bounds description, including the pools in one tract, on the theory that the designated area represented the surface above one geologic structure which Humble identified as a large anticline.

Plaintiffs first contend that the lease provision quoted above does not entitle Humble to retain an entire geologic structure but only the subterranean pools of hydrocarbons from which minerals are actually being produced. Their argument is that the "area" is not to be designated by a metes and bounds description on the surface, but rather by delimiting the pools themselves, drawing their horizontal and vertical bounds. Under this three-dimensional designation theory Humble would be required to treat each pool of hydrocarbons as a separate "producing area" so that the lease would remain in force beyond the primary term only on the pools themselves, and terminate as to the sands above and below the producing pools and in the remainder of what Humble contends is one geologic structure. In the alternative, plaintiffs argue that even if the lease does entitle Humble to retain an entire geologic structure the area designated by Humble is still too large, both horizontally and vertically. The plaintiffs contend that the horizontal designation is too large on the theory that there is not one geologic structure under this area, but rather two separate structures which should be separately desig-

nated. They contend that the lease calls for the designation to set vertical limitations because Humble is only entitled to retain the geologic structures and not the areas which lie above or below them.

The district court, sitting without a jury, made a finding of fact that the area designated by Humble is included in a single geologic structure, proven to be productive at the end of the primary term. The court construed the lease as authorizing Humble to designate the producing area by defining the boundaries of the tract or area of land overlying the geologic structure within which the producing pools occur. The court concluded that since the production is occurring from a geologic structure, the lessee is not limited in designating the area to the pools or reservoirs, but rather is authorized to designate the surface above the entire geologic structure. The district court held that the designation made by Humble was authorized by the terms of the lease.

There is a wealth of geological evidence, including maps and exhibits, generally accepted by both parties as accurate but the geologists testifying for the respective parties differ in their opinions as to the proper interpretation of that evidence. A careful review of the record convinces us that the evidence fully supports the district court's findings of fact on the geologic conditions in the disputed area. We also find the lease unambiguous and agree with the construction placed upon it by the district court. Plaintiffs' argument that the lease requires Humble to make a three-dimensional designation calls for a strained and artificial construction more calculated to ascertain the plaintiffs' present desires than the actual intent of the parties when they executed this lease. "Area" was the basic term for that which was to be designated and is clearly more appropriate for surface measurement than three-dimen-

sional measurements when used in the context of an oil and gas lease. As this Court said in *Fleming* v. *Farmers' Peanut Co.*, 128 F(2) 404 (5th Cir. 1942), "The word area means a surface, a territory, a region . . ." We are of the opinion that Humble properly designated the area upon which the lease is to remain in force. That designation is binding on both plaintiffs and defendant.

In their Contention B plaintiffs claim that Humble has produced less than the minimum quantities of oil and gas that it covenanted to produce and seek either damages for breach of the covenant or forfeiture of the lease except for twenty acres around each producing well (the maximum forfeiture provided in the lease upon termination for any cause). Humble is alleged to have breached the following provisions of the "nonexploration" contract:

> "We further agree subject to the orders, rules, and regulations of the Railroad Commission of Texas, and/or other lawful authority to produce from said leased premises currently approximately that portion of our total production in the State of Texas that we estimate the proven reserves on these leased premises are of our total proven reserves in the State of Texas from time to time."

Since this covenant was entered before the partition of the King Ranch, the "leased premises" to which it refers comprise the entire King Ranch. Humble supplied production and reserves data as to the Atwood properties and Humble's state-wide holdings, but did not produce data on the entire King Ranch production and reserves as separate figures, although they were included in its statewide figures. Plaintiffs assert their claim as owners of the Atwood properties, which were partitioned from the King Ranch, but argue that in order to calculate the

minimum production required by the covenant they must be supplied with separate figures on Humble's production and reserves, year by year from 1933 to date of trial, on the entire King Ranch, not just the Atwood portion. The district court ruled that the defendant is not required to disclose this data because under its interpretation of the covenant such information is unnecessary.

Upon any breach of the minimum production covenant plaintiffs contend that damages accrue to the owner of each partitioned portion of the ranch on a pro rata basis according to the acreage he owns. Therefore, since the Atwood properties constitute 13.78% of the total acreage under the King Ranch lease, plaintiffs assert that they are entitled to 13.78% of any damages for lease-wide underproduction. In order to compute this alleged underproduction plaintiffs claim the right to discovery of production and reserves data on the remainder of the ranch in which they own no interest.

Since the partition of the King Ranch plaintiffs' share of the royalty from production on the ranch has been determined solely by the production from the property partitioned to them. Where land leased for oil and gas is subdivided in Texas, absent agreement to the contrary, the owner of the subdivided tract is entitled to all of the royalties resulting from the production of oil and gas upon his parcel of land. He does not share in the royalties of the whole undivided tract in the proportion that the area of his land bears to the entire tract. The leading Texas case is *Japhet* v. *McRae*, 276 S.W. 669 (Tex. Comm. App. 1925, judg. adopted by Tex. Sup. Ct.). Plaintiffs do not contend that they are entitled to any royalty from production on land other than the Atwood properties and yet they claim to be entitled to share in damages awarded for alleged underproduction on the entire ranch. As we

understand plaintiffs' argument they would prorate any such damages among the land owners solely on the basis of acreage owned, without regard to the reserves or the production on a particular landowner's property. The error this method would produce is illustrated by the following. The owner of a partitioned tract without known reserves would be entitled to share in any recovery for underproduction, in spite of the fact that he would be entitled to no royalties otherwise. The owner of a partitioned tract from which the lessee was producing in excess of the minimum required by the covenant would be entitled to share in any such damages even though the lessee was admittedly producing more from his tract than the formula required.

Plaintiffs are no more entitled to share in any recovery of damages for breach of the minimum production covenant on someone else's land than they are to share in royalty on production from that land. Their share of any damages for under production on the ranch as a whole should be calculated on the basis of the reserves and production on the Atwood properties, just as their share of the royalties is calculated from the production on that property. If the ranch-wide production and reserve data the plaintiffs seek were made available, the minimum production required for the entire ranch would be calculated as that percentage of the state-wide production that the ranch reserves are of the state-wide reserves. Plaintiffs would be entitled to that percentage of the minimum production required on the ranch as a whole that the reserves on the Atwood properties are of the ranch-wide reserves. This being the case, there is no reason why the minimum production required for their reserves cannot be calculated as a percentage of the state-wide figures without the necessity of having the data on the ranch as a whole. The mini-

mum production to which the plaintiffs are entitled is the same by either calculation, so we see no need to remand this case for discovery of the data on the ranch as a whole. This is valuable information concerning property in which plaintiffs have no interest. We should not require its disclosure absent some need for it.

Perhaps it should be noted that when we speak of the minimum production required in terms of percentages of the state-wide production we recognize that there should be some allowance for a reasonable variance from the calculated minimum. The covenant obligates the lessee to produce "approximately" that minimum and the approximation is based on the lessee's "estimate" of the proven reserves. The covenant clearly contemplates a reasonable latitude in performance before a breach occurs.

Plaintiffs argue by analogy from the proposition that Humble could have defended this suit on a lease unit basis, *Stephenson* v. *Glass*, 276 S.W. 1110 (Tex. Civ. App. 1925, error ref'd), that in defending this suit the damages must be calculated on a lease unit basis. Obviously Humble could be injured if it were required to defend a suit for underproduction on the leased premises by calculating production on each partitioned portion of the leased premises. It might be held to have breached the covenant as to one portion when its production on another was sufficient to offset that underproduction so that, considering the lease as a unit, there would be no breach. However, it is difficult to see how the plaintiffs are harmed here if Humble elects not to defend on a lease unit basis and calculates the minimum production required on the basis of a partitioned portion of the whole lease. Humble admits that it has waived any right to defend this suit on a lease unit basis. Such a waiver could increase Humble's obligations in some cases, but it could not decrease its obligations to the lessor.

For purposes of this suit, plaintiffs have calculated what they contend is the underproduction on the Atwood properties using the production and reserves data from that property, although they still argue they should have been given figures for the entire King Ranch. They calculated oil separately from gas, claiming damages to the full extent that either oil or gas fell below the alleged minimum, without regard to whether the other mineral was produced in excess of that minimum. They allowed no offset from the claimed underproduction in a particular year for those years in which Humble produced in excess of the minimum.

The district court entered fact findings that the actual production from the reserves at a rate above that required by the production formula more than offset any accumulated underproduction. The court found that at the time of trial the total production from the reserves had resulted in royalty income to the plaintiffs approximately one and three-quarters times the income required under the production formula. The court concluded that the nature of oil and gas in the reservoirs is such that the production formula agreement, couched in general terms with relation to reserves, is not to be construed as requiring production separately of a certain quantity of gas and a certain quantity of oil, but only such combined production of these substances as may be necessary to produce revenue to the royalty interest approximately equivalent to that which would have been realized by the literal and separate production of oil and gas in specific quantities. The court found that the defendant had not breached the production formula agreement in the contract.

We are in complete agreement with the district court's findings and conclusions of law. The covenant does not mention oil and gas separately, but speaks in terms of

production from "reserves". There is nothing in the agreement that indicates it was contemplated that Humble should be required to produce a specific quantity of each mineral in each year. We are of the opinion that this covenant was designed to secure a fair level of royalty income to the lessor without regard to whether it came from oil or gas. When the production from the execution of the covenant to the date of trial is considered as a whole, allowing overages in oil to offset under production of gas, the defendant has clearly produced more than was required by the minimum production covenant. We find no breach of that covenant.

In Contention C, plaintiffs urge that Humble has breached the express covenant of reasonable development and ask that the lease be terminated except for twenty acres around each producing well. By the express covenant Humble agreed "reasonably to develop the producing structure, that is, lessee agrees to develop the same to the extent that a reasonably prudent operator would develop it under the same or similar circumstances". At the trial plaintiffs' geologist testified that a reasonable and prudent operator would have drilled approximately six to eight more wells than Humble did. Humble produced no contrary testimony but pointed to evidence in the record that shows it has drilled 179 wells on this property. The trial court found that Humble had not breached the covenant of reasonable development, and we are of the same opinion. Even if it were conceded that the lessee, who had drilled 179 wells, should have drilled six or eight more, that is not sufficient to constitute breach of a "reasonable development" covenant. The over-all program of development that the plaintiffs' geologist suggested would be reasonable is too close to the program Humble actually followed to say that one is reasonable, the other unreasonable. The evidence fully supports the district

court's finding of fact that the lessee has not failed reasonably to develop the lease premises involved in this litigation.

Plaintiffs' Contentions D and E are based on paragraph three of the lease which provides, in part:

> "3. The royalties to be paid by lessee are: (a) On oil, one-eighth of that produced and saved from said land, the same to be delivered at the wells or to the credit of lessors at the pipeline to which the wells may be connected."

It is plaintiffs' contention that this provision expressly reserves a definite amount of royalty oil *in kind* to the lessors and that they have the right to demand delivery of their royalty oil in kind at any time they wish. They also contend that where Humble has processed some of plaintiffs' royalty oil without their consent and made a net profit therefrom, that this constitutes a conversion of the oil by Humble so that it became the constructive or resulting trustee of plaintiffs' oil. Plaintiffs claim that Humble should be required to account to them for any net profits which it made from processing that oil.

The district court entered findings of fact that plaintiffs did not demand delivery of royalty oil in kind at the time of the trial or at any time prior to trial. Nor did they tender any facilities for the taking of royalty oil in kind at the time of trial or prior thereto. The court also found that it is and has been the industry custom since some years prior to 1935 for the lessee to market all of the oil at the lease to the field purchaser if other than the lessee, or to purchase all of the oil from the lease at the field price if it is the purchaser in the field. The district court construed the lease and contemporary agreements as clearly contemplating the payment of royalty in money rather than in kind.

An examination of the lease and contemporaneous agreements as a whole, in an effort to see just what sort of arrangement the parties to this transaction contemplated, shows clearly that they intended to provide for payments by the lessee in money, rather than oil in kind. The opening clause of the royalty paragraph quoted above describes the royalties to be *paid* by the lessee. Obligations to be "paid" are usually to be paid in money. *P. G. Lake* v. *Commissioner*, 148 F(2) 898 (5th Cir. 1945); *Himes* v. *Himes* 55 SW(2) 181 (Tex. Civ. App. 1932). Paragraph nine of the lease, the clause relating to reduction of royalties in event of lessor's title failure, also uses the word paid: " . . . then the royalties to be paid lessors shall be reduced proportionately."

Looking at the contemporaneous agreements entered with the lease, the same intention is evident. As a part of the King Ranch deal Humble prepaid delay rentals for all of the twenty-year primary term. The "non-exploration" agreement granted Humble the right to recapture the delay rentals out of royalty for and during each of the eleventh to twentieth years provided that the prepaid rental for a particular year could be recaptured only out of royalty produced during the same year. The loan agreement recognizes the rental recapture right and provides for its coordination with the collection of the loans. Both of these agreements provide for retention of funds by Humble out of the proceeds of the royalties. The "non-exploration" agreement gave Humble the right

> "to the retention of certain portions of the royalties . . . as its own property during the second ten year period thereof, to wit: one hundred twenty seven thousand eight hundred twenty-four and 60/100 dollars . . . and the retention may be made out of the proceeds of any royalties . . . "

The loan agreement provides that Humble during the first ten years shall have the right to "apply the proceeds of royalties" upon the notes and during the second ten year period "to appropriate unto itself and retain as its own property the proceeds of all the royalties . . . to the extent of $127,824.60 each year and to apply the proceeds from all the royalties in excess of $127,824.60 each year upon the notes". It is quite clear that the parties intended that Humble should convert the oil into money, retain the amount to which it was entitled under these agreements, and pay the remainder to the lessor.

We hold that the lease, when construed with these contemporaneous agreements, provides for payment by the lessee in money. The reference to delivery at the wells or to the credit of the lessor in the pipeline is apparently intended to fix the lease as the locality for determining the price at which the lessee is to make such payment. Were this intention not clear from the face of the instruments, which we believe it is, the industry custom recognized by the district court in its fact findings and the actions of the plaintiffs themselves would lead us to the same conclusion. The court found that it was customary for the lessee to market all of the oil at the lease to the field purchaser if other than the lessee, or to purchase all of the oil from the lease at the field price if it is the purchaser in the field. The plaintiffs admittedly neither requested delivery of the royalty oil in kind nor tendered any facilities for the taking of the oil in kind at the time of trial or at any time prior to trial, although there had been production on the Atwood properties since 1939. Such conduct is clearly inconsistent with the notion that this agreement was understood to call for delivery of the oil in kind, rather than a money payment.

It is, of course, apparent that our construction of the lease is fatal to plaintiffs' claims for net profits from

Humble's processing royalty oil. That contention is based on the plaintiffs' allegation that the lease called for payments of royalty oil in kind. Since Humble is required to pay this royalty in money, not oil, plaintiffs cannot complain of Humble's processing of that oil or assert any interest in the profits from that processing.

In Contention F the plaintiffs assert that two large payments they received from Humble in 1949 and 1950 represented the purchase price of specific oil and should not be credited to Humble's royalty obligation under the lease. The payments in question were made while other litigation was pending in which plaintiffs attacked the validity of the Humble lease. During this period plaintiffs refused to accept royalty payments under the lease for fear their actions would constitute a ratification of the lease they were attacking. Prior to the payments involved here Humble had tendered many royalty checks to the plaintiffs, but they had refused to cash them. In view of the fact that the plaintiffs apparently needed money and Humble was anxious to settle its royalty obligation to them, negotiations were begun in 1948 to explore the possibility of making the payments under an agreement which would protect plaintiffs from any prejudice to their lawsuit then pending against Humble. These negotiations are evidenced by a series of letters which appear in the record. In 1949 the first payment was made under a contract by which plaintiffs acknowledged receipt of $363,024.66 as payment in full for 272,794.57 barrels of oil extracted by Humble from a portion of the Atwood properties "and credited on its books of account to Edwin Atwood and Alice B. Atwood". The contract provided that acceptance of this payment would not affect the litigation then pending between the Atwoods and Humble. About a year later the parties repeated this arrangement and a second payment was made in the amount of $1,025,942.65.

Plaintiffs now contend that these two payments were "simple outright sales to Humble by plaintiffs of so many stipulated barrels of oil in return for so many stipulated dollars . . . " and that they cannot be credited to Humble's royalty obligation under the lease. They now assert that Humble still owes them royalty on all of the oil produced during that period except for that which was "sold" under the two contracts, together with interest. The district court entered a fact finding that the lessee has paid plaintiffs for all royalty accruing to them under the lease.

The record in this case fully supports the district court's finding on this point. No one denied that the amount of these payments was determined by a calculation of the royalty due the plaintiffs under the lease. The mathematical formula which was used was 29/32 of 1/8 of 8/8 (total runs). The figures obtained from that formula were reduced only by the amount to which Humble was entitled by virtue of the recapture clause in the agreement. In order to find that these two payments were not royalty, but actually payments for a "simple sale of oil" by plaintiffs to defendants, we should have to reach the absurd conclusion that defendant already owned approximately 7/8 of the oil for which it paid plaintiffs. If these payments were not royalty, then the only interest in the oil they represented that plaintiffs had was 29/32 of 1/8. The remainder belonged to the lessee and another royalty owner. Yet plaintiffs were paid for 8/8 of that oil, less the amount subtracted under the recapture clause of the lease. This leaves little doubt but what Humble paid the plaintiffs their royalty, not a purchase price for specific oil that just happened to be the same amount as the royalty due.

The language of the contracts under which these payments were made, the correspondence reflecting the negotiations which led up to them, and the very manner in

which the amount of the payments was calculated lead to the inescapable conclusion that all parties intended these two payments to be credited to Humble's royalty obligation to plaintiffs, and we hold that it must be so credited.

The agreement between the lessors and Humble included the following provision:

> "Before making the application [of lessor's royalties] here provided for upon said mortgage notes [held by Humble as part of the mortgage and mineral lease transaction] out of the proceeds of said royalties, the lessors in said lease shall be entitled to retain a sufficient amount out of such proceeds to pay such income taxes as may be assessed against them by reason of their income from such royalties." (bracketed phrases added for clarity)

Plaintiffs assert in Contention G that Humble did not provide them with funds to pay their income taxes in accord with this provision and that, therefore, Humble is liable to them for interest of 6 percent per annum on the funds they did not receive. The district court made the following fact finding:

> "The lessee paid plaintiffs all sums due them under the lease as early as it reasonably could do so under all the circumstances associated with and resulting from the institution and prosecution by the plaintiffs of this and earlier litigation asking for cancellation or attacking the validity of the lease and seeking to set aside the partition of the King Estate and the [2023] Trustee's computation of fractional division of interest among the persons sharing therein."

We see no need to review the extensive evidence on Humble's attempts to pay the plaintiffs and their refusal to cash the checks mailed to them. The evidence fully supports

the district court's fact findings. We hold that Humble is not liable to plaintiffs for such interest.

The final contention raised by plaintiffs is based on the fact that the district court adopted the proposed findings of fact and conclusions of law drafted by counsel for the winning party. They urge that for this reason the judgment must be reversed and the cause remanded for a new trial before another judge, or in the alternative that this court should ignore the trial court decision and decide the fact questions as though it were the trial court. It is well settled that the practice of adopting the proposed findings and conclusions submitted by the winning party does not erase the "clearly erroneous" rule. *Vincent* v. *Suni-Citrus Products Co.*, 215 F(2) 305 (5th Cir. 1954); *Louis Dreyfus & Cie.* v. *Panama Canal Co.*, 298 F(2) 733 (5th Cir. 1962). It is the duty of counsel to assist the court in obtaining complete and accurate findings. The record shows that the court instructed Humble to submit a copy of its proposed findings and conclusions to the plaintiffs. They were given ample time in which to suggest any changes they felt necessary, but the plaintiffs offered the court no assistance whatsoever, either by presentation of proposed findings or by criticism of those proposed by Humble. They are now in no position to complain of the court's findings simply because they are in accord with those suggested by the other party. Their whole argument rests on the unfounded assumption that the district judge failed to perform his duty of making findings and conclusions to support the judgment. By assuming that the findings do not represent the real determination and conclusions of the court, but were merely spoon-fed to the court, the plaintiffs impugn the integrity of the district court and make an unwarranted assumption that finds no support in the record. The findings and conclusions are fully supported by the evidence. We have considered each of the plaintiffs' contentions and find no error in the judgment of the district court. It is therefore AFFIRMED.

APPENDIX III

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1964

No. 21606

D. C. Docket No. 8630—Civil Action

EDWIN K. ATWOOD, ALICE B. ATWOOD, RICHARD W. ATWOOD, N.C.M., by ALICE B. ATWOOD as his next friend and conservatrix, and ALICE B. ATWOOD, as conservatrix of the Estate of Richard W. Atwood, N.C.M., THOMAS H. FISHER and RUTH P. FISHER,
Appellants,

versus

HUMBLE OIL & REFINING COMPANY
Appellee

Appeal from the United States District Court for the South District of Texas.

Before **Hutcheson, Rives** and **Brown**, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Edwin K. Atwood, Alice B. Atwood, Richard W. Atwood, N.C.M., by Alice B. Atwood as his next friend and conservatrix, and Alice B. Atwood, as conservatrix of the Estate of Richard W. Atwood, N.C.M., Thomas H. Fisher and Ruth P. Fisher, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Issued as Mandate: November 19, 1964

APPENDIX IV

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21606

EDWIN K. ATWOOD, ALICE B. ATWOOD, RICHARD W. ATWOOD, N.C.M., by ALICE B. ATWOOD as his next friend and conservatrix, and ALICE B. ATWOOD, as conservatrix of the Estate of Richard W. Atwood, N.C.M., THOMAS H. FISHER and RUTH P. FISHER,
Appellants,

versus

HUMBLE OIL & REFINING COMPANY
Appellee.

Appeal from the United States District Court for the South District of Texas.

(January 26, 1965)

ON PETITIONS FOR REHEARING

Before **Hutcheson, Rives** and **Brown**, Circuit Judges.

Per Curiam:

It is ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be, and the same are, hereby DENIED.

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No. 1094

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

EDWIN K. ATWOOD, ALICE B. ATWOOD, RICHARD W. ATWOOD, N.C.M., by ALICE B. ATWOOD, as His Next Friend and Conservatrix, and ALICE B. ATWOOD, as Conservatrix of the Estate of Richard W. Atwood, N.C.M., THOMAS H. FISHER and RUTH P. FISHER,

Petitioners,

VS.

HUMBLE OIL & REFINING COMPANY,

Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI, AND ACCOMPANYING MOTION FOR ISSUANCE OF WRIT OF CERTIORARI AND PEREMPTORY JUDGMENT OF REVERSAL WITHOUT ORAL ARGUMENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1094

EDWIN K. ATWOOD, ALICE B. ATWOOD, RICHARD W. ATWOOD, N.C.M., by ALICE B. ATWOOD, as His Next Friend and Conservatrix, and ALICE B. ATWOOD, as Conservatrix of the Estate of Richard W. Atwood, N.C.M., THOMAS H. FISHER and RUTH P. FISHER,

Petitioners,

vs.

HUMBLE OIL & REFINING COMPANY,

Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI, AND ACCOMPANYING MOTION FOR ISSUANCE OF WRIT OF CERTIORARI AND PEREMPTORY JUDGMENT OF REVERSAL WITHOUT ORAL ARGUMENT.

Now come EDWIN K. ATWOOD, ALICE B. ATWOOD, RICHARD W. ATWOOD, N.C.M., by ALICE B. ATWOOD, as His Next Friend and Conservatrix, and ALICE B. ATWOOD, as Conservatrix of the Estate of Richard W. Atwood, N.C.M., THOMAS H. FISHER and RUTH P.

FISHER, Petitioners, by their attorneys, DAVID BLAND and SIDNEY FARR, and petition the Court for a rehearing of their prior Petition for Writ of Certiorari, and also move the Court for the issuance of a writ of certiorari and peremptory judgment of reversal without oral argument, upon the grounds set forth in their "Petitioners' Reply Brief," which did not reach the Clerk of this Court until either one day or two days after this Court had denied such Petition for Writ of Certiorari on May 24, 1965.

And in support of such petition and motion, the undersigned counsel for Petitioners hereby certify that such petition and motion are presented in good faith and not for delay, and that such petition and motion are restricted to substantial grounds which were not previously presented to the Court at the time said Petition for Certiorari was denied on May 24th, but which substantial grounds are set forth in Petitioners' Reply Brief filed with this Court on May 25th or 26th, 1965.

It is respectfully prayed that this Court grant the foregoing petition and motion.

Respectfully submitted,

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